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No. 86-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1986

SMITH BARNEY, HARRIS UPHAM & CO., INC. and ALBERT ROBERTS III,

Petitioners,

vs.

EDWARD J. ADRIAN and RUTH C. ADRIAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

In *Shearson/American Express, Inc.* v. *McMahon*, 478 U.S. ____, 107 S.Ct. 2332, 55 U.S.L.W. 4757 (June 8, 1987), this Court held that claims under §10(b) of the Securities Exchange Act of 1934 (the "1934 Act") and the Federal Racketeer Influenced and Corrupt Organizations ("RICO") Act are subject to arbitration pursuant to an agreement to arbitrate which is enforceable under the Federal Arbitration Act. The Court of Appeals below, in a decision rendered prior to *McMahon*, held that §10(b) and RICO claims are exempt from arbitration. Accordingly, the questions presented are:

1. Did the court below err in holding that claims under §10(b) of the 1934 Act are exempt from the provisions of the Federal Arbitration Act in light of the subsequent *McMahon* decision?

2. Did the court below err in holding that claims under the RICO Act are exempt from the provisions of the Federal Arbitration Act in light of the subsequent *McMahon* decision?

PARTIES TO THE PROCEEDING

1. EDWARD J. ADRIAN, Respondent/Plaintiff.
2. RUTH C. ADRIAN, Respondent/Plaintiff.
3. SMITH BARNEY, HARRIS UPHAM & CO., INC., Petitioner/Defendant.
4. ALBERT ROBERTS, III, Petitioner/Defendant.
5. Morton L. Annis, Jr., Defendant.

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SMITH BARNEY, HARRIS UPHAM & CO., INC. AND ALBERT ROBERTS III,

Petitioners,

vs.

EDWARD J. ADRIAN AND RUTH C. ADRIAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners, SMITH BARNEY, HARRIS UPHAM & CO., INC. and ALBERT ROBERTS III respectfully request that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit (App.Ex."A") is reported at 815 F.2d 655 (11th Cir. 1987). The decision of the district court (App.Ex."B") is unreported.

JURISDICTION

The Court of Appeals issued its decision on April 28, 1987. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The appendix to this petition sets forth the relevant statutory provisions. (App.Ex."C").

STATEMENT OF THE CASE

Plaintiffs/Respondents, EDWARD J. ADRIAN and RUTH C. ADRIAN brought this action asserting claims under §10(b) of the 1934 Act, the RICO Act and under state statutory and common law for alleged misconduct in connection with securities accounts maintained by them with Defendant/Petitioner SMITH BARNEY, HARRIS UPHAM & CO., INC. ("SMITH BARNEY"). Defendant Morton L. Annis, Jr. was the ADRIANS' account executive and Defendant/Petitioner ALBERT ROBERTS III was manager of the Tampa, Florida branch office where the account was maintained.

Pursuant to the terms of an arbitration clause contained in their SMITH BARNEY Customer Agreements and the Federal Arbitration Act, the district court ordered arbitration of all of the ADRIANS' claims, including the §10(b) and RICO claims. On appeal, the circuit court

affirmed the order compelling arbitration of the ADRIANS' state law claims. However, the circuit court reversed the order compelling arbitration of the §10(b) and RICO claims based on Eleventh Circuit precedent holding that such claims were exempt from the provisions of the Federal Arbitration Act. *Adrian* v. *Smith Barney, Harris Upham & Co., Inc.*, 815 F.2d 665 (11th Cir. 1987).

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts with this Court's Subsequent Decision in *Shearson/American Express, Inc.* v. *McMahon*

In *Shearson/American Express Inc.* v. *McMahon*, 478 U.S. ____, 107 S.Ct. 2332, 55 U.S.L.W. 4757 (June 8, 1987) this Court held that claims under §10(b) of the 1934 Act and under the RICO Act were subject to arbitration pursuant to agreements enforceable under the Federal Arbitration Act. The *McMahon* decision overruled contrary holdings of several circuit courts of appeal on these issues, including the Eleventh Circuit. *See E.F. Hutton & Co., Inc.* v. *Wolfe*, ____ U.S. ____, 55 U.S.L.W. 3833 (June 15, 1987) (granting petition for writ of certiorari, vacating the en banc decision of Eleventh Circuit Court of Appeals reported at 800 F.2d 1032 and remanding for proceedings consistent with *McMahon*).

The decision below relied on precedent which has since been overruled by *McMahon*. Thus, the decision below is in direct and irreconcilable conflict with *McMahon* on the issue of arbitration of §10(b) and RICO claims. Accordingly, Petitioners respectfully submit that certiorari review of the decision below is appropriate because it conflicts with *McMahon* on this issue.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that this Court issue a Writ of Certiorari to review the decision of the Eleventh Circuit Court of Appeals below to the extent it holds, contrary to the subsequent *McMahon* decision, that claims under §10(b) of the 1934 Act and the RICO Act are exempt from the provisions of the Federal Arbitration Act.

DATED July 24, 1987, Miami, Florida.

Respectfully submitted,

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APPENDIX A

IN THE

United States Court of Appeals,

ELEVENTH CIRCUIT.

April 28, 1987.

RICHARD D. DRISCOLL,

vs. Plaintiff-Appellant,

SMITH BARNEY, HARRIS, UPHAM & CO., AND RICHARD SHALLA,

Defendants-Appellees.

EDWARD J. ADRIAN, RUTH C. ADRIAN,

vs. Plaintiffs-Appellants,

SMITH BARNEY, HARRIS, UPHAM & CO., INC., A DELAWARE CORPORATION, MORTON L. ANNIS, JR., ALBERT ROBERTS, III,

Defendants-Appellees.

Nos. 85-5921, 85-3816 and 86-3009.

Brokerage customers brought actions arising out of alleged mismanagement of securities accounts by firm and its employees. After the United States District Court for the Southern District of Florida, No. 84-8223 CIV-EBD, Edward B. Davis, J., 625 F.Supp. 25, and the United States District Court for the Middle District of Florida, No. 84-1652-CIV-T-13, George C. Carr, J., had granted firm's motions to compel arbitration on all claims, customers appealed. The Court of Appeals, Vance, Circuit Judge, held

that: (1) claims under the federal Racketeer Influenced and Corrupt Organization Act based on violations of federal securities laws were not subject to compelled arbitration; (2) claims under Florida Racketeer Influenced and Corrupt Organization Act were subject to compelled arbitration; and (3) brokerage customers seeking to evade compelled arbitration of state law claims pursuant to arbitration agreements had failed to adequately allege invalidity of arbitration agreements.

Affirmed in part; reversed in part; and remanded with directions.

1. Exchanges 11(11)

Federal securities law claims under §10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 were not subject to compulsory arbitration based upon preclaim brokerage agreements. Securities Exchange Act of 1934, §10(b), 15 U.S.C.A. §78j(b).

2. Commerce 82.71

Claim under the federal Racketeer Influenced and Corrupt Organization Act must be based on underlying, independently unlawful acts. 18 U.S.C.A. §§1961, 1962.

3. Exchanges 11(11)

Claims under the federal Racketeer Influenced and Corrupt Organization Act based on violations of federal securities laws were not subject to compelled arbitration. 18 U.S.C.A. §§1961-1968.

4. Constitutional Law 70.1(7)

Court of Appeals cannot create exception to federal Arbitration Act absent some indication, whether express or implied, of congressional intent for such an exception. 9 U.S.C.A. §§1-14.

5. Exchanges 11(11)

Securities Act of 1933 and Securities Exchange Act of 1934 provide congressional intent to exclude claims under particular provisions of acts from mandate of federal Arbitration Act. 9 U.S.C.A. §§1-14; Securities Exchange Act of 1933, §12(2), 15 U.S.C.A. §771(2); Securities Exchange Act of 1934, §10(b), 15 U.S.C.A. §78j(b).

6. Arbitration 3.3

Congressional intent that federal Racketeer Influenced and Corrupt Organization Act claims not be subjected to compelled arbitration is found by implication from unique structure of RICO statute which cross-references other predicate statutes. 9 U.S.C.A. §§1-14; 18 U.S.C.A. §§1961-1968.

7. Arbitration 3.3

Claims under Florida Racketeer Influenced and Corrupt Organization Act were subject to compelled arbitration, even though predicate acts for Florida RICO claim were federal securities law violations that were not subject to compelled arbitration, given the federal Arbitration Act. 9 U.S.C.A. §§1-14; West's F.S.A. §895.011 *et seq.*

8. Exchanges 11(11)

Brokerage customers seeking to evade compelled arbitration pursuant to customer agreements on ground arbitration agreements were unconscionable adhesion contracts

had produced no evidence indicating agreements were adhesion contracts, demonstrating neither lack of meaningful choice nor that arbitration clauses were inherently unfair or oppressive.

9. Exchanges 11(11)

Brokerage customers seeking to evade compelled arbitration pursuant to customer agreements on ground agreements lacked mutuality of obligation had failed to show lack of mutuality of obligation, where in return for customers' assent to customer agreements, brokerage firm obligated itself to perform all necessary services in connection with maintenance of customers' accounts and to submit any controversy relating to accounts to arbitration.

10. Exchanges 11(11)

Absence of signature by brokerage firm's representative on customer agreement including arbitration provision did not prove lack of mutuality of obligation sufficient to permit customers to evade compelled arbitration.

11. Exchanges 11(11)

Allegations of brokerage customers seeking to evade compelled arbitration pursuant to arbitration agreements on theory that arbitration agreements were fraudulently induced, that when customer agreements were signed, brokerage firm's agent indicated that consent to customer agreement was mere formality and did not inform customers about arbitration provision, went to formation of entire contract rather than to misrepresentation with respect to arbitration clause, and were thus allegations which should be heard by arbitrator rather than by district court.

12. Exchange 11(11)

Brokerage customers seeking to evade compelled arbitration of state law claims pursuant to customer agreements had failed to allege fraud in the "factum" through allegations that when customer agreements providing for arbitration were signed, brokerage firm's agent indicated consent to customer agreements was mere formality and did not inform customers about arbitration provision; claimed misrepresentation did not go to very character or essential terms of proposed contract.

13. Exchanges 11(11)

Brokerage firm had not waived its right to arbitration by failing to request arbitration within 30-day period called for by district court's order; brokerage firm's actions reflected persistent and zealous effort to secure arbitration of customers' claims, and any delay in request for arbitration was understandable, given that customers had immediately appealed order permitting arbitration.

14. Federal Civil Procedure 825

Plaintiffs' right to amend their complaint once as matter of course remained unimpeded, where defendants' only filing prior to motion to amend was motion to dismiss and to compel arbitration. Fed.Rules Civ.Proc. Rule 15(a), 28 U.S.C.A.

Russell L. Forkey, Layne Verebay, Ft. Lauderdale, Fla., for plaintiff-appellant in No. 85-5921.

Robert B. Goldman, Ruden, Barnett, McClosky, Schuster & Russell, P.A., Bennett Falk, Keith Olin, Miami, Fla., for defendants-appellees in No. 85-5921.

Kirk M. Gibbons, John B. Gibbons, Tampa, Fla., for plaintiff-appellants in Nos. 85-3816 and 86-3009.

Kathy M. Klock, Miami, Fla. for Annis.

O'Bannon M. Cook, Ruden, Barnett, McClosky, Schuster & Russell, P.A., Bennett Falk, Robert B. Goldman, Tallahassee, Fla., Keith Olin, Miami, Fla., for Smith Barney, Inc. and Roberts.

Appeal from the United States District Court for the Southern District of Florida.

Appeal from the United States District Court for the Middle District of Florida.

Before VANCE and ANDERSON, Circuit Judges, and ARONOVITZ,* District Judge.

VANCE, Circuit Judge:

These separate suits arise out of the alleged mismanagement of securities accounts by Smith Barney, Harris, Upham & Co. (Smith Barney) and its employees. Richard Driscoll asserts claims against Smith Barney and Richard Shalla for violations of Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 (the 1934 Act) and for breach of fiduciary duty under Florida law. Edward and Ruth Adrian also allege violations of Section 10(b) and Rule 10b-5 of the 1934 Act and breach of fiduciary duty, along with claims under the federal Racketeer Influenced and Corrupt Organization Act (18 U.S.C. §§1961-68), the Florida Racketeer Influenced and Corrupt Organization Act (Fla.Stat. Chap. 895), the Florida Securities and Investor Protection Act (Fla.Stat. Chap. 517), and state law negligence, gross negligence, fraud, conversion, and breach of contract. Upon setting up their accounts, the Adrians and

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* Honorable Sidney M. Aronovitz, U.S. District Judge for the Southern District of Florida, sitting by designation.

Driscoll signed agreements which included clauses providing that disputes relating to these accounts would be subject to arbitration. Pursuant to these brokerage agreements, the district courts in these two cases granted Smith Barney's motions to compel arbitration on all claims. 625 F.Supp. 25 (S.D.Fla. 1985). Plaintiffs now contend that the district courts erred in compelling arbitration.[1]

A. Federal Securities Law Claims

[1] The first issue before this court is whether claims brought under Section 10(b) of the 1934 Act are subject to arbitration. This precise issue was recently taken up by this court sitting en banc. *Wolfe* v. *E.F. Hutton & Co.*, 800 F.2d 1032 (11th Cir. 1986). In *Wolfe*, this court held that preclaim agreements to arbitrate 10b-5 claims are not enforceable. In light of this recent decision, we reverse the portion of the district courts' orders compelling arbitration of plaintiffs" federal securities law claims.[2]

B. Federal RICO Claims

[2,3] The Adrians allege violations of the federal RICO statute. Unlike the typical state or federal claim, a RICO claim must be based upon underlying, independently unlawful acts. *See* 18 U.S.C. §§1961-62; *Greenblatt* v. *Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1361 (11th Cir. 1985). This unique feature of RICO presents special problems in determining whether RICO claims are subject to arbitration under a preclaim agreement. In *Tashea* v. *Bache, Halsey, Stuart, Shields, Inc.*, 802 F.2d 1337 (11th

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[1] This court has jurisdiction under 28 U.S.C. 1292(a)(1) to review a district court order compelling arbitration. See *Miller* v. *Drexel Burnham Lambert, Inc.*, 791 F.2d 850, 853 (11th Cir. 1986).

[2] We note, however, that the Supreme Court has granted review to resolve a split among the circuit courts on this very issue. *Shearson/American Express, Inc.* v. *McMahon*, U.S. , 107 S.Ct. 60, 93 L.Ed.2d 20 (1986).

Cir. 1986), this court held that federal RICO claims based on violations of the federal securities laws are not subject to compelled arbitration. Since the underlying acts in the Adrians' federal RICO claim are federal securities law violations, *Tashea* mandates that the district court decide this claim.

C. State Law Claims

In concluding that federal RICO claims based on federal securities law violations are not arbitrable, the *Tashea* court relied on the fact that in this circuit, according to *Wolfe v. E.F. Hutton & Co.*, 800 F.2d 1032 (11th Cir. 1986) (en banc), the underlying predicate acts were not arbitrable. The *Tashea* court reasoned:

> Consistency in the orderly adjudication of these claims would seem to require the RICO claim to be decided in the same forum as the separate federal securities claims.

802 F.2d at 1338.

Along with enumerating a number of state law crimes as constituting "racketeering activity," the Florida statute incorporates "[a]ny conduct defined as 'racketeering activity' under 18 U.S.C. 1961(1)(A), (B), (C) and (D)." Fla. Stat. §895.02(1)(b). This statutory scheme permits the predicate acts for the Florida RICO claim to be federal securities law violations which are not arbitrable.

[4] In the interest of consistency, *Tashea* would seem to require that the Florida RICO claim be decided in the same forum — the federal courts — as the separate federal securities claims on which it is based. This conclusion, however, would be contrary to a fundamental precept of statutory interpretation. This court cannot create an exception to the Federal Arbitration Act, 9 U.S.C. §§1-14, absent some indication, whether express or implied, of congressional intent

for such an exception. As the Third Circuit recently commented in light of the Supreme Court's opinion in *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985), which held that antitrust claims against foreign corporations are arbitrable: "It would appear therefore that determining statutory claims to be nonarbitrable on the basis of some judicially recognized public policy rather than as a matter of statutory interpretation is no longer permissible." *Jacobson* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 797 F.2d 1197, 1202 (3rd Cir. 1986).

[5-7] The Securities Act of 1933 and the Securities Exchange Act of 1934 provide the congressional intent to exclude claims under Sections 12(2) and 10(b) of those respective acts from the mandate of the Federal Arbitration Act. *Wilko* v. *Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953); *Wolfe* v. *E.F. Hutton & Co.*, 800 F.2d at 1032. The congressional intent that federal RICO claims not be subjected to arbitration is found by more subtle implication: "the unique structure of the RICO statute which cross-references other predicate statutes," *Jacobson* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 797 F.2d at 1202. We have no indication by way of statutory enactment that Congress intended to likewise exclude state RICO claims. Indeed Congress could not have remotely foreseen the enactment by states of statutes patterned after its own. Nor can it be said that excluding state RICO claims from the mandate of the Federal Arbitration Act is necessary to effectuate some congressional purpose. We must therefore hold that the Adrians' Florida RICO claims are subject to arbitration.

Controlling authority requires that plaintiffs' other state law claims be arbitrated. In *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985), the Supreme Court concluded that arbitration

agreements are enforceable with respect to state law claims, even if the accompanying federal securities law claims proceed to trial. The Court's language in *Byrd* is unequivocal.

> [T]he Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums.

105 S.Ct. at 1241. *See also Coleman* v. *Prudential Bache Securities, Inc.*, 802 F.2d 1350 (11th Cir. 1986); *Wolfe* v. *E.F. Hutton & Co.*, 800 F.2d 1032 (11th Cir. 1986) (en banc).

[8-10] In an attempt to evade *Byrd*, plaintiffs raise a number of challenges to the arbitration agreements employed by Smith Barney. Plaintiffs charge that these agreements to arbitrate are not valid contracts because they were fraudulently induced, were unconscionable adhesion contracts, and lacked mutuality of obligation. Plaintiffs are correct that a court may not order arbitration unless and 'until it is satisfied that a valid arbitration agreement exists.' *Miller* v. *Drexel Burnham Lambert, Inc.*, 791 F.2d 850, 854 (11th Cir. 1986). Their attacks on these arbitration agreements, however, do not survive close scrutiny. Plaintiffs produce no evidence to indicate that the arbitration agreements are adhesion contracts. They demonstrate neither a lack of "meaningful choice," *Williams* v. *Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C.Cir. 1965), nor that the arbitration clauses are inherently unfair or oppressive. *See Coleman* v. *Prudential Bache Securities, Inc.*, 802 F.2d at 1352; *Surman* v. *Merrill Lynch, Pierce, Fenner & Smith*, 733 F.2d 59, 61 n.2 (8th Cir. 1984). Similarly, plaintiffs fail to show a lack of mutuality of obligation. In return for plaintiffs' assent to the Customer Agreement, Smith Barney

obligated itself to perform all the necessary services in connection with the maintenance of plaintiffs' accounts and, in particular, to submit any controversy relating to these accounts to arbitration.[3]

[11, 12] Plaintiffs' chief argument is that the arbitration agreements were fraudulently induced. Driscoll and the Adrians independently submitted affidavits to buttress this contention. The sum of their affidavits is the same: when each signed the Customer Agreement, Smith Barney's agent indicated that the investor's consent to the Customer Agreement was a mere formality required to transact business with Smith Barney and never informed the investor about the arbitration provision. The allegations contained in the affidavits, however, go to the formation of the entire contract rather than to any misrepresentation with respect to the arbitration clause. Under *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), where the claims of confusion and fraud go to the circumstances surrounding the signing of the contract as a whole, these allegations should be heard by an arbitrator and not by the district court. *See also Coleman* v. *Prudential Bache Securities, Inc.*, 802 F.2d at 1352; *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Haydu*, 637 F.2d 391 (5th Cir. Unit B 1981). [4]

Despite their best efforts, plaintiffs have failed to adequately allege the invalidity of the arbitration agreements.

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[3] The Adrians also are incorrect in arguing that the absence of the Smith Barney representative's signature on the Customer Agreement proves a lack of mutuality of obligation. *Cf. Associated Hardware Supply Co.* v. *Big Wheel Distributing Co.*, 355 F.2d 114 (3d Cir. 1965); *Starkman* v. *Seroussi*, 377 F.Supp. 518 (S.D.N.Y. 1974).

[4] Appellants also fail to allege fraud in the "factum" since the claimed misrepresentation by defendants does not go to the very character or essential terms of the proposed contract. *See Cancanon* v. *Smith Barney, Harris, Upham & Co.*, 805 F.2d 998 (11th Cir. 1986).

We therefore affirm the district courts' orders compelling arbitration of plaintiffs' breach of fiduciary duty and other state law claims.

D. Waiver

[13] The Adrians' further contend that Smith Barney waived its right to arbitrate his claims by failing to request arbitration within the thirty day period called for by the district court's order. This argument is without merit. Smith Barney's actions reflect a persistent and zealous effort to secure arbitration of the Adrians' claims. Any delay in Smith Barney's request for arbitration was entirely understandable since the Adrians' had immediately appealed the order permitting arbitration. Given that any doubts about a waiver of arbitration must be resolved in favor of arbitration, *Moses H. Cone Memorial Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 941-942, 74 L.Ed.2d 765 (1983), the Adrians' clearly have not met their "heavy burden" of proving waiver. See *Belke* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 693 F.2d 1023, 1025 (11th Cir. 1982).

E. Motion to Amend

[14] The district court also denied the Adrians' motion to amend their complaint. Federal Rule of Civil Procedure 15(a) provides that "[a] party may amend his pleadings once as a matter of course at any time before a responsive pleading is served. . ." Defendants' only filing prior to the motion to amend was their motion to dismiss and to compel arbitration. Such a motion to dismiss is not a "responsive pleading." *See, e.g. McGruder* v. *Phelps*, 608 F.2d 1023, 1025 (5th Cir. 1979); *Barksdale* v. *King*, 699 F.2d 744, 747

(5th Cir. 1983). Therefore, the Adrians' right to amend their complaint as a matter of course remained unimpeded.[5]

F. Conclusion

The district court's judgment in No. 85-5921 is AFFIRMED as to the state claim and REVERSED as to the federal claims. That case is REMANDED with directions that the district court deny defendants' motion to arbitrate the federal securities law claims. The district court judgment in No. 85-3816 and No. 86-3009 is also AFFIRMED as to the state claims and REVERSED as to the federal claims. Those cases are REMANDED with directions that the district court deny defendants' motion to arbitrate the federal securities law claims and the federal RICO claims, and that the district court grant plaintiffs' motion to amend their complaint.

AFFIRMED in part. REVERSED in part and REMANDED with directions.

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[5] The decision to deny the motion to amend was also premised on the incorrect belief that all of the plaintiffs' claims were arbitrable.

APPENDIX B

IN THE

United States District Court

MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

Case No. 84-1652-Civ-T-13

EDWARD J. ADRIAN AND
RUTH C. ADRIAN, HIS WIFE,

Plaintiffs,

VS.

SMITH BARNEY, HARRIS UPHAM &
CO., INC., MORTON L. ANNIS,
JR. AND ALBERT ROBERTS, III,

Defendants.

ORDER

This cause comes before the Court upon the defendant Morton L. Annis, Jr.'s consolidated motion to compel arbitration and the consolidated motion to dismiss or compel arbitration filed by the defendants Smith Barney, Harris Upham & Co., Inc. and Albert Roberts, III. In addition to their response to the above motions, the plaintiffs have filed a motion to amend their complaint and a motion to strike a reply to their response. The defendants oppose the motion to amend the complaint.

The plaintiffs' motion to strike the reply is GRANTED since the reply was filed in violation of Local Rule 3.01(b), Middle District of Florida. The reply will not be considered in the determination of the issues before the Court.

The original complaint contains ten counts, including: count I, brought under the Securities Exchange Act of 1934; count II, under the Florida Investors Protection Act; count III, alleging negligence; count IV, gross negligence; count V, breach of contract; count VI, fraud; count VII, conversion; count VIII, breach of fiduciary relationship; count IX, Federal RICO; and count X, alleging a violation of Florida's RICO statute. The plaintiffs motion to amend the complaint seeks to include an additional count alleging violation of the Securities Act of 1933.

The motion to dismiss is DENIED as to all counts in the original complaint. It is well established that "a motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would not be entitled to recover under any state of facts that could be proved in support of his claim." *Cook & Nichol, Inc.* v. *The Plimsoll Club*, 451 F.2d 505, 506 (5th Cir. 1971). *Accord*, *Conley* v. *Gibson*, 355 U.S. 41 (1957); *see also Sedima, S.P.R.L.* v. *Imrex Company, Inc.*, 53 U.S.L.W. 5034, 5038 (U.S. July 1, 1985) (no need for prior conviction before bringing civil action under RICO).

In view of the Supreme Court's liberal reading of the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*, in *Dean Witter Reynolds, Inc.* v. *Byrd*, 105 S.Ct. 1238 (1985), compelling arbitration of pendent state law claims, counts II through VII and count X of the original complaint shall be arbitrated as provided in paragraph 16 of the "customer's agreement" signed by the plaintiffs. That agreement provided:

> Subject to the last three sentences of this paragraph, any controversy arising out of or relating to the account of the undersigned shall be settled by arbitration in accordance with the rules, then in effect, of the Board of Directors of the American Stock Exchange, Inc., the Board of Directors of

> the New York Stock Exchange, Inc., or the National Association of Securities Dealers, Inc., as the undersigned may elect . . . . Judgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction thereof. The parties, hereto, and all who claim under their rights shall be bound conclusively by such arbitration. The federal securities laws provide that agreements may not bind persons to waive compliance with any provision of the federal securities laws. Therefore, nothing in this paragraph shall in any way constitute a waiver or limitation of any rights which the undersigned may have under any federal securities laws. The provisions of this paragraph do not apply to commodity accounts, which are governed by the provisions of the commodity customer's agreement.

Paragraph 16 of "customer's agreement", Smith Barney's consolidated motion (Exhibit "A").

The remaining issues are whether count IX, alleging a violation of the federal RICO statute, and count I brought under the Securities Exchange Act of 1934, should be submitted to arbitration, and whether the plaintiffs should be allowed to amend their complaint to include count XI, which alleges a violation of the Securities Act of 1933. There has been no authoritative ruling from the Supreme Court as to the propriety of compelling arbitration of a civil claim brought under the federal RICO act. In fact, the issue of "whether a RICO claim is a nonarbitrable federal claim is an open question in [the Eleventh] circuit." *Greenblatt* v. *Drexel Burnham Lambert, Inc.*, No. 84-8522, slip op. at 4712 (11th Cir. June 25, 1985). However, considering the Supreme Court's opinion in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983), suggesting that "any doubts concerning the scope of

arbitrable issues should be resolved in favor of arbitration", and the recent Eleventh Circuit decision in *Greenblatt*, slip op. at 4712, stating that "a RICO claim is unusual in that it must be based on underlying, independently unlawful acts" that are often, as in the case at bar, contractual and state law claims, arbitration of the federal RICO claims is appropriate. *See Id.* (determination of predicate acts underlying Federal RICO claims is "directly within the scope of the contractual arbitration clause and the arbitrator's expertise"). The motions to compel the federal RICO claims are GRANTED. *See e.g. Finn* v. *Davis*, No. 84-8414-Civ-Gonzalez, Order at 7-8 (S.D.Fla. June 20, 1985) (compelling arbitration of RICO claim).

The claims under the federal securities laws in Count I of the original complaint and count XI of the proposed amended complaint present more difficult questions. The language of the customer's agreement, above, as well as rulings from the Supreme Court and the Eleventh Circuit express concern for the preservation of rights arising under the federal securities laws. The decision of *Wilko* v. *Swan*, 346 U.S. 427 (1953), "held that a predispute agreement to arbitrate claims that arise under §12(2) of the Securities Act of 1933, 15 U.S.C. §77 1 (2), was not enforceable." *Byrd*, 105 S.Ct. at 1240 n.1. The *Wilko* v. *Swan* decision was extended by the Fifth Circuit, and later the Eleventh, to apply in the context of claims arising under the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), thereby holding that agreements to arbitrate such claims are unenforceable. 105 S.Ct. at 1240 n.1 (citing *Sibley* v. *Tandy Corp.*, 543 F.2d 540, 543 and n.3 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977); *Belke* v. *Merrill Lynch, Pierce, Fenner & Smith Inc.*, 693 F.2d 1023 (11th Cir. 1982).

The Fifth and Eleventh Circuit Court of Appeals decisions that precluded arbitration of claims brought under the Securities Exchange Act of 1934, have recently been drawn

into question. Both the *Sibley* and the *Belke* decisions, *supra*, were based upon the "intertwining" doctrine. "Under the intertwining approach, 'when it is impractical if not impossible to separate out non-arbitrable federal securities laws claims from arbitrable contract claims, a court should deny arbitration in order to preserve its exclusive jurisdiction over the federal securities act claims.'" *Dimestein* v. *Whiteman*, Nos. 84-8369 to 84-8371, slip op. at 3552 (11th Cir. May 8, 1985) (quoting *Sibley*, *supra*). The *Byrd* decision specifically rejected the intertwining approach. 105 S.Ct. at 1241. In response, the Eleventh Circuit announced that the *Byrd* decision had caused "us to shift our focus." *Dimestein*, slip op. at 3552-54 (outlining Supreme Court's rejection of intertwining approach and expressing agreement with portion of justice White's concurrence in Byrd which suggested that arbitrable and nonarbitrable claims go forward independently without stay in proceedings). Both *Byrd* and *Dimestein*, together with the national policy favoring arbitration, *see Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983), and the lead of other district courts within this circuit, convinces this Court that arbitration of a claim under the Securities Exchange Act of 1934, may be compelled if within the terms of an enforceable arbitration agreement. *See e.g.*, *Niven* v. *Dean Witter Reynolds, Inc.*, No. 84-1594-Civ-T-10 (M.D.Fla. March 28, 1985); *Finn* v. *Davis*, No. 84-8414-Civ-Gonzalez (S.D.Fla. June 20, 1985); *Driscoll* v. *Smith Barney, Harris Upham & Co., Inc.*, No. 84-8223-Civ-Davis (June 6, 1985); *Greenstein* v. *First Biscayne Corporation*, No. 82-0584-Civ-Hastings (S.D.Fla. May 16, 1985); see also 105 S.Ct. at 1244-45 (White, J., concurring).

The customer's agreement in the case at bar expressly provided that "nothing in this paragraph shall in any way constitute a waiver or limitation of any rights which the undersigned may have under any federal securities laws."

See supra. Since this Court has found that claims brought under the Securities Exchange Act of 1934 may be arbitrable, the above language does not prevent arbitration. In any event, the plaintiff's rights under the securities laws will be adequately protected since "arbitration proceedings will not necessarily have a preclusive effect on subsequent federal-court proceedings." *Byrd*, 105 S.Ct. at 1243. If the plaintiffs wish to raise their claims under the 1934 Act after arbitration, the Court, at that time, may "directly and effectively protect federal interests by determining the preclusive effect to be given to [the] arbitration proceeding." *Id*. The motions to compel arbitration of count I of the original complaint are GRANTED.

Only the motion to amend the complaint remains to be decided. Before the plaintiffs sought to amend their complaint the issue of arbitrability had been hotly debated and thoroughly briefed by the parties. In order to resolve the issues raised in those briefs in light of recent decisions, this Court Ordered consolidated motions and responses. The motion to amend the complaint to include a nonarbitrable claim was filed the very next day, approximately seven months after the original complaint and over two months after an amended motion to compel arbitration of all claims in the original complaint had been filed. As stated by a federal district court in *Greenstein* v. *First Biscayne Corporation*, No. 82-0584-Civ-Hastings (S.D.Fla. May 16, 1985):

> Plaintiffs[s], realizing the possible effect of the *Byrd* decision on the arbitrability of [their] cause of action, have moved for leave to amend [their] complaint to include a non-arbitrable §12(2) claim [under the federal Securities Act of 1933]. Allowing amendment at this late stage of the proceedings is within the sound discretion of the Court. *Chitmacha Tribe of Louisiana* v. *Harry L. Laws Co.*, 690 F.2d 1157, 1163 (5th Cir. 1982).

The Court should consider, among other factors, whether amendment would cause delay in the proceedings, whether amendment would lead to expeditious disposition of the merits of the litigation and judicial economy. *Id.*

As all the other claims have been compelled to arbitration, amendment would result in undue delay and would be counter-productive to expeditious resolution of the action.

The motion to amend the complaint is DENIED.

The defendants are Ordered to answer the original complain within ten (10) days as provided in Rule 12(a), Federal Rules of Civil Procedure. After both defendants have answered, this action is stayed for thirty (30) days within which any party may apply for arbitration. if such application is made and the arbitration proceedings go forward, the stay will remain in effect until the arbitrators' final decision is properly filed with the Court or until further Order of the Court. The defendants are directed to file with the Court at the end of sixty (60) days a report concerning the status of the arbitration proceedings.

DONE AND ORDERED in Chambers at Tampa, Florida, this 17th day of September, 1985.

/s/ George C. Carr

UNITED STATES
DISTRICT JUDGE

APPENDIX C

THE FEDERAL ARBITRATION ACT, 9 U.S.C. §3

Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. July 30, 1947, c. 392, 6a Stat. 670.